

Kumar (Migration) [2023] AATA 2087 (30 June 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Varinder Kumar
REPRESENTATIVE:	Mr Harsh Yadav (MARN: 2117646)
CASE NUMBER:	2208847
HOME AFFAIRS REFERENCE(S):	BCC2020/2800525
MEMBER:	Wendy Banfield
DATE:	30 June 2023
PLACE OF DECISION:	Canberra
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 30 June 2023 at 5:57pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – false or misleading information or bogus documents provided in relation to visa application – bank statement and term deposit receipt – department’s checks showed bank account does not exist – father contacted local bank official to organise documents – evidence of property, assets and Australian account provided later – applicant responsible for documents, however obtained – indifference to father’s and official’s actions – no compassionate or compelling circumstances to waive requirements – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5(1), 65
Migration Regulations 1994 (Cth), r 1.03, Schedule 2, cl 500.217(1), (5), Schedule 4, condition 4020(1)*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 15 June 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 11 December 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because there was evidence before the Minister that the applicant provided, or caused to be provided, false or misleading information in a material particular or a bogus document in relation to the visa application.
6. The applicant appeared before the Tribunal on 19 May 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
8. Prior to the hearing, the applicant provided the following submissions:
 - Department of Home Affairs (the Department) notification and decision record dated 15 June 2022.
 - Applicant's Indian passport biometric information.
 - Written submission to the Tribunal.
 - Affidavit of Funds from Raj Kumar, the applicant's father dated 11 May 2023 attaching Valuation Certificate for a residential building belonging to Raj Kumar.
 - Sale Deed in the name of Raj Kumar as purchaser.
 - Affidavit by Raj Kumar dated 3 May 2021.
 - Commonwealth Bank statement in the name of the applicant dated 5 May 2021.
 - Commonwealth Bank statement in the name of the applicant dated 5 May 2023.
 - Applicant's Indian education certificates and results.
 - Evidence of the applicant's completed studies in Australia; Master of Business Administration and Master of Professional Accounting.
 - Letter from Richmond School of Business dated 9 May 2023 confirming the applicant's enrolment in a Graduate Diploma of Management (Learning).
 - Confirmation of Enrolment for a Graduate Diploma of Management from 03/04/2023 to 01/10/2024.

- Letter from Parhar Hospital dated 4 May 2021 advising the Raj Kumar was admitted to hospital on 1 November 2020 and discharged 6 November 2020.
 - Passport and national identity details for Raj Kumar.
 - HDFC Bank transaction receipt dated 20 April 2021.
 - Thomas Cook transaction receipts dated 27 and 29 April 2021.
9. The Tribunal also considered relevant evidence submitted to the Department at the time of application, including the applicant's response to the natural justice letter of 13 April 2021.
10. In its decision record of 15 June 2022, the Department made the following findings:
11. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
12. On 11/12/2020, the applicant lodged this application for a Student (TU-500) visa. In support of the application, they provided a bank statement and a term deposit receipt from ICICI Bank dated 16/01/2021. The bank statement shows the applicant is the account holder and held a balance of Rs.17,74,344 in account number 023813007166.
13. The Department conducted checks to confirm the veracity of the financial documents provided by the applicant in support of the student visa application. The Department has received information that confirmed the bank account with ICICI Bank did not exist. Therefore, the document is considered to be bogus.
14. On 13/04/2021, the Department requested the applicant, via a natural justice letter, to provide comment on the findings that the financial document is suspected to be bogus document. The applicant was also asked to specify if they believed there were any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all PIC 4020(1) to justify the grant of the visa. The applicant was provided 28 days to response to the request letter...
15. I have considered the applicant's natural justice statement and I acknowledge applicant states that their father had a medical condition and provided evidence of a bone fracture which prevented their father from undertaking their own banking. As a result their father employed a commissioned agent to organise a bank fixed deposit for them in relation their financial requirement. The applicant states they were surprised when they were notified by the department that the bank deposit did not exist. The applicant states they were a victim of a scam. However, the applicant has not provided sufficient evidence that absolves them from being complicit in providing or causing to provide a bogus document.
16. Based on the evidence and information before me, I find that the applicant has provide bogus document, I am not satisfied that the applicant meets Public Interest Criterion (PIC) 4020, subclause 4020 (1).
17. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

19. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

20. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
21. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
22. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
23. The Department wrote to the applicant on 13 April 2021 inviting him to comment on information for a Student (Temporary) (class TU) Student (subclass 500) visa. The information put to him was that the ICICI bank statement and term deposit receipt dated 16 January 2021 showing him as the account holder and a balance of Rs.17,74,344 in account number 023813007166 did not exist and the documents were not genuine. A response was provided which included the following information.

24. *Response to the Department*

25. The applicant asked his father in India to provide evidence of funds; his father had an accident and as he was hospitalised, he asked the bank by phone for a fixed deposit statement or letter; due to the COVID-19 pandemic the bank was providing little assistance; a local bank official was then contacted who agreed to arrange the documents; the documents were provided and the fixed deposit statements indicated their value at maturity; the applicant and his father did not know the documents were not genuine and were shocked when they received a letter from the Department; upon going to the bank the applicant's father found out it was true the documents were not genuine but the agent had resigned; the applicant's father instead transferred funds to the applicant's Australian bank account; the Department was asked to consider that the applicant and his father were the victims of a scam and the applicant is sincere student who has always abided by visa conditions.

26. *Evidence to the Tribunal*

27. The applicant's representative provided a written submission prior to the hearing. The submission set out the applicant's student background and the visa refusal. An account was given of the circumstances that the applicant alleged had occurred that led to the provision of bogus documents to the Department. It was claimed the deposit statement "*was on applicant's father's name and not the applicant's name*"; that the applicant had no control over it, and he was able to establish after the incident that he had genuine funds. It was further claimed that neither the applicant nor his family altered documents. The Tribunal was asked to consider that there needed to be an element of fraud or deception to attract the operation of PIC4020. The submission advised that the documents were to show evidence of financial capacity and that this was done after funds were transferred. In addition, it was claimed there was no intention to mislead the Department.
28. The applicant attended a hearing and presented arguments in his case. In response to the Department's findings that he had provided bogus documents, the applicant said he did not have any wrong intention but had asked for help from his father. He provided an account of what he said occurred which was consistent with his written submissions but provided more details in response to the Tribunal's questions. According to the applicant, his father's income was from farming, and he held savings and cash. The applicant claimed his father usually dealt with a different bank but met with a banking agent who attended with a laptop and arranged the documents. The applicant was asked why his father did not approach his usual bank if that was where he kept funds. It was claimed the applicant's father had contacted HDFC, his usual bank but "*they could not help him*". He said the agent recommended ICICI bank and the applicant's father thought it would be quicker. The applicant was asked about the funds that were meant to be in a bank account, as represented by the ICICI documents. The applicant claimed they have not received the money back and are still looking for the person.
29. The Tribunal considered the applicant's submissions and arguments in support of his application for review. A written response to the Department's natural justice letter was submitted in which it was claimed neither the applicant nor his father was aware the bank documents that were produced and submitted were bogus. However, the applicant conceded his father later learnt the Department's information was true, and the documents were not genuine. The Tribunal is satisfied the Department conducted checks to verify the document said to be for deposits with ICICI Bank in India and received information that it was not genuine. The applicant provided evidence of property and assets, as well as funds in an Australian bank account after receiving the Department's natural justice letter as evidence of financial capacity but this does not absolve him of having provided bogus documents at the time of application.

30. The Tribunal did not find the applicant's account of events regarding his provision of bogus documents in support of his visa application to be persuasive. The applicant claimed to have sufficient funds to support his studies, and that his father usually banked with HDFC, yet his evidence is that he allowed his father, and then an unknown third party to procure documents from another bank. The applicant did not indicate whether he verified the availability of money that was said to have been deposited for his use with ICICI bank, but if he had, he would have learnt himself that there was no such account. It is not sufficient for an applicant to merely produce documents that refer to an amount of money being deposited but that he must have genuine access to those funds. Regarding the applicant's claims that the deposit "*was on applicant's father's name and not the applicant's name*", it is not clear whether the argument is that the applicant's father made the arrangements because the bank documents were in the name of the applicant himself. If it was meant the applicant's father made the arrangements, the applicant is still responsible for the documents he provides with his own visa application, however they were obtained.
31. The Tribunal accepts the applicant may not have been complicit in providing bogus documents to the Department, however, he was indifferent about the process undertaken to obtain them. To be indifferent to the actions of a third party such as an agent, the applicant does not need to be aware that a bogus document has been given by that other person. In addition, the applicant does not need to have given instructions to that other person for the bogus document to have been given or caused to be given by the applicant. If the applicant is complicit in the provision of false information or 'indifferent' to a third party acting unlawfully or dishonestly, it can be said that the applicant caused it to be given. The Tribunal finds the applicant was indifferent as to how the financial documents were obtained in this case.
32. For these reasons, the Tribunal concludes there is evidence the applicant has given, or caused to be given, to the Minister, a 'bogus document' as defined in s 5(1), that is, a document that the Tribunal reasonably suspects is counterfeit or has been altered by a person who does not have authority to do so whether or not made knowingly in relation to the visa application.
33. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

34. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
35. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
36. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
37. The Tribunal considered the Department of Home Affairs *Migration Policy and Operational Contents* in determining whether the requirements of PIC 4020(1) should be waived.

According to departmental policy, there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa
- Australia's relationship with a foreign government would be damaged if the person is not granted the visa or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.

38. It is departmental policy that compelling circumstances affecting the interests of Australia would not include circumstances where the applicant merely claims that, if granted the visa, they would:

- work and pay taxes in Australia,
- pay fees to an education provider; or
- spend money in Australia.

39. The applicant stated at the Tribunal hearing that he has qualifications as an electrical engineer to contribute to Australia. He said he had worked in construction and hospitality including in regional areas. The Tribunal notes the applicant declared in his visa application form that he completed a Bachelor of Technology in India, and a Master of Professional Accounting and MBA in Australia. His work experience in Australia includes as a "picker/packer", a delivery driver with Dominos and as a sand blaster. At the time of application, the applicant provided Confirmation of Enrolment certificates for a Diploma of Leadership and Management and Graduate Diploma of Management. In his genuine temporary entrant statement submitted with his application for a student visa, the applicant declared his intention after studying was to work in management but did not specify a field. The Tribunal is not satisfied the applicant has a special skill that is highly sought after in Australia such that he should be granted a visa.

40. The applicant stated at the hearing that there are no compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen in his case.

41. Therefore, the requirements of PIC 4020(1) should not be waived.

42. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

43. There is no evidence the applicant meets the criteria for any other subclass within the class of visa.

DECISION

44. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Wendy Banfield
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...